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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY HUNTER and ARTHUR HUNTER, *Petitioners,*

vs.

AGNES MAXIE, *Respondent.*

RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does the Indian Child Welfare Act 25 U.S.C. §1901 *et seq.* apply to involuntary adoption proceedings when the party seeking the termination of parental rights is a private person(s) within the extended family of the Indian child?

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JURISDICTIONAL STATEMENT

This court lacks jurisdiction to review pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On February 6, 1980, A.B.M., an Alaska Native, gave birth to a daughter, R.P.H. (R 5). Six days later A.B.M. gave the child to her sister M.H. and M.H.'s husband, A.H., for adoption. (R 22). A.B.M. signed a consent to adoption that was filed along with the petition (R 4). On April 9, 1980 a hearing was held in Anchorage pursuant to the Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.*, (hereinafter "ICWA"), at which A.B.M. consented to the adoption and voluntarily relinquished her parental rights to the child. A decree terminating her parental rights was entered on April 23, 1980 (R 7-8). A hearing was held on the petition for adoption four months later, and an adoption decree was entered on September 5, 1980 (R 15).

In January, 1981, the Alaska Department of Health and Social Services (hereinafter "DHSS") discovered that it had not received the statutorily-required notice of the adoption petition, and moved to have the adoption proceedings reopened (R 16-18). On January 30, 1981, Superior Court Judge Jay Hodges vacated the September 5, 1980 adoption decree, reopened the adoption proceedings, and ordered that DHSS perform home studies on both the prospective adoptive parents and A.B.M. (R 12).

After A.B.M. indicated in a late January affidavit that she wanted her child back (R 22), she formally petitioned under ICWA for return of custody on February 2, 1981 (R 23). Hearings on her petition were scheduled for June, 1981.

Exhaustive and important court-ordered adoption studies on both the prospective adoptive parents and the natural mother were submitted to the court on March 27, 1981 (R 37-50). The prospective adoptive parents' study recommended that the adoption be denied; it based its conclusion on their extensive history of serious alcohol abuse and physical and emo-

tional abuse of their three sons, R (the oldest son), D1, and the youngest son, D2. A.H. and M.H. failed to provide a decent nurturing atmosphere in which a family could flourish or even survive. The study notes that M.H.'s and A.H.'s behavior had regularly required that DHSS intervene on behalf of the children since the late 1960's.

A.H. and M.H. neither tried to cooperate with DHSS's attempts to help them solve their parenting difficulties (T 111-113, 118), nor did they learn from their past failures (R 43). The H's washed their hands of their two sons when they relinquished all parental rights to them in March, 1981 (T 94).

The DHSS study of the natural mother's home described an environment very different from life with A.H. and M.H. It found the natural mother to be a good and loving parent to her three-year-old daughter, T (R 47-50) and did not find any major inadequacies in her parenting abilities.

On June 18 and 19, 1981, Judge Hodges held hearings in Fairbanks and Anchorage to determine the future custody of R.P.H. (T 16-253). At the beginning of these hearings Judge Hodges summarily denied, without oral argument, A.B.M.'s motion for partial summary judgment seeking to establish the ICWA standards as controlling (T 19). The Court did not apply the ICWA but instead decided to treat the matter as an adoption under State law (T 17-19, 89-90, 253).

Testimony at the hearings largely supported the information contained in the adoption studies.

After two days of hearings and the testimony of twelve witnesses the Superior Court orally ruled that under State law A.B.M. would not be allowed to withdraw her consent to the adoption, and the adoption petition of M.H. and A.H. would be granted (T 19, 253). A.B.M. appealed to the Alaska Supreme Court on July 20, 1981 (R 100).

That court issued its opinion on September 24, 1982. The opinion reversed the lower court, determined that the ICWA did apply and remanded the case to the Superior Court for a hearing on the return of the child pursuant to the protections afforded in the ICWA. The Hunter's petition for rehearing was denied on November 9, 1982.

SUMMARY OF ARGUMENT

The decision of the Alaska Court should not be disturbed. The decision was well reasoned and fair. There does not exist a conflict between the States concerning the application of the Indian Child Welfare Act to involuntary adoption proceedings where the parties are related private persons. The cases cited by the petitioner do not support the granting of the instant petition; they are distinguishable in law and fact from the instant case and the issue is not presently ripe for review by this court.

ARGUMENT

I. THE COURT BELOW GAVE FULL CONSIDERATION TO THE ISSUES RAISED HEREIN AND DECIDED THEM CORRECTLY.

In *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982), the decision below, the Alaska Supreme Court determined that the Act applied to the custody of an Indian child in contested adoption proceedings regardless of the status of prospective adoptive parents as members of the extended family of the child, inasmuch as Congress intended no exceptions in the provisions of the Act for such disputes. *Id.* at 1173. The Act has among its purpose the protection of the stability and security of Indian Tribes and families. H.R. Rep. No. 1386 95th Cong. 2d. Sess. 25-26 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530. In aid of this goal, certain procedural safeguards are afforded the natural parent of a child for whom an adoption decree had been vacated, including return of the child to the natural parent absent a showing beyond a reasonable doubt that to do so would not be in the best interests of the Indian child 25 U.S.C. §1916(a). The Alaska Court correctly concluded that this portion of the Act meant exactly what it said, *A.B.M., supra.* 651 P.2d 1170 at 1175, noting that the Act elsewhere makes specific distinctions between "family" and "extended family" (see 25 U.S.C. §1903(2).) *A.B.M., supra,* 651 P.2d 1170 at 1173. Any other construction of the Act would result in the

disruption of Indian families; the very evil that the Act was designed to remedy. This purpose of the Act would indeed be defeated if disgruntled family members[1] were permitted to do what governmental or private agencies cannot, bring state proceedings without regard to the preservation of cultural values the Act seeks to protect.

II. THE CASES CITED BY THE PETITIONERS ARE DISTINGUISHABLE ON THEIR FACTS FROM THE DECISION BELOW.

The petitioner has asserted that cases from the courts of Kansas and Montana conflict with *A.B.M. supra,* in their interpretation of the Act. For the reasons set forth below, the cases are readily distinguishable on their facts, and cannot, for that reason, be said to conflict.

In *Baby Boy L,* 643 P.2d 168 (Kansas 1982) the Supreme Court of Kansas determined that the ICWA did not apply to a proceeding where a non-Indian mother voluntarily placed her infant child for adoption with a specified family. Other relevant facts were that the parental rights of the putative father, an Indian, had been terminated and the child had never lived in an Indian culture. The Kansas court relied upon these facts heavily, specifically stating that a major intent of the ICWA was to maintain the integrity of relationships existing in Indian homes and

> it was not dictated that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.

Id. at 175. The court also emphasized the voluntary nature of the mother's consent and her intent to withdraw such consent if placement with the particular adoptive parents was not

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[1] In the instant case, the prospective adoptive father, Petitioner Arthur Hunter is a member of a distinctly different Native group.

accomplished. The court clearly limited its finding to the facts of this case stating: "It was never the intent of Congress that the Act would apply to a factual situation such as is before the court" and "We are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress." *Baby Boy L, supra,* 643 P.2d at 175.

The facts in the Alaska case are very different; an Indian mother has withdrawn her consent to the adoption of her Indian child. Thus the cultural values that the ICWA seeks to preserve are at issue; *Baby Boy L* does not address facts such as these and cannot be interpreted as conflicting with the Alaska decision.

In *In re Bertelson,* 617 P.2d 121 (Montana 1980) a non-Indian mother and the child's Indian paternal grandparents were engaged in a custody-visitation battle. In contrast, in *A.B.M.,* an Indian's mother desire to stop an involuntary adoption is at issue. In the former, neither party's legal rights to see or be with the child are in danger of being terminated. In *A.B.M.,* the result sought by the prospective adoptive parents would terminate the maternal rights of the mother. Further distinctions based upon the facts of *Bertelson* are difficult to draw because of the limited record from which the appeal was taken. (See Point III, *infra.)*

In summary, the *Baby Boy L* and *Bertelson* decisions are clearly based upon facts entirely distinct from those in the instant case.

III. THE RECORD ON APPEAL IN *BERTELSON* WAS INADEQUATE AND DOES NOT PRESENT A BASIS FOR COMPARISON WITH *A.B.M.*

The Montana court had at its disposal only a District Court file and the transcripts of an order to show cause hearing at which one party neither presented testimony in his behalf nor cross-examined the opposing party.

> The record before us consists solely of the District Court file (with nothing of any help to us) and the transcript of the April 30, 1979 show cause hearing held to compel the Stanleys to show cause why they should not be required to return the daughter to Irene Bertelson, the mother.

Id. at 124. The Montana court was severely hampered by the poor record and remanded the case for further proceedings.

> In reaching its decision, the trial court set forth neither the controlling facts nor how this decision was reached.
>
> Because the welfare of an innocent young child is at stake, we are concerned that a final decision of the jurisdictional questions presented be based on accurate factual information.

Id. at 124. The scant trial court record in the Montana case defeats any effort to compare the legal reasoning of the Montana and Alaska courts. (See Point IV, *infra.)*

Justice Frankfurter once observed, in commenting on the available grounds for denying certiorari in a similar situation, that this court must frequently deny certiorari if the record was inadequate even if all the jurisdictional requirements were met:

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

(Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-919, 70 S. Ct. 252, 94 L. Ed. 562. (1950).) The Bertelson record below is too cloudy to provide the court with adequate basis for comparing the reasoning in *Bertelson* and that in *A.B.M.*

IV. THE KANSAS COURT'S DECISION AND THE DECISION BELOW ARE CONSISTENT IN THEIR APPLICATION OF THE GENERAL PRINCIPLES OF THE INDIAN CHILD WELFARE ACT.

In *Baby Boy L, supra,* the Kansas court drew the same conclusion as the Alaska Supreme Court, that under the ICWA the timely withdrawal of consent by a natural parent mandates the return of the child to the parent pursuant to 25 U.S.C. §1916. In discussing the application of the ICWA to the facts, the Kansas court cited 25 U.S.C. §1913 for the proposition that the lower court's denial of tribal intervention was at worst harmless error because the mother intended to withdraw her consent if placement with the chosen adoptive parents was not accomplished:

> Any attempt to effect the preferential placement contemplated by the Act would necessarily result in the removal of the baby from the custody of appellees and thereupon there being no consent by the mother to any such action, the child would be returned to her.

(Baby Boy L, 643 P.2d 168, at 177.) Clearly this assessment is not in conflict with the Alaska Supreme Court's determination that "because A.B.M. petitioned for the return of her child when the H's adoption decree was vacated, her child must be returned to her unless such an agreement is proved to be contrary to R.H.'s best interests under the standards established by the Indian Child Welfare Act." *A.B.M., supra* 651 P.2d at 1176.

V. THE MONTANA DECISION IS DISTINGUISHABLE ON ITS LEGAL THEORY

Bertelson, supra, focused on the conflict between state and tribal court jurisdiction and did not present a thorough evaluation of the legislative history of the ICWA and its interaction with state law:

> [1] Because of the paucity of the trial court record before us, and *because of the importance of this case to a claim of Indian tribal jurisdiction,* we determine that the best course of action is to remand this case to the trial court so that it can develop a complete evidentiary record and make complete findings of fact and conclusions of law.

Bertelson, supra, 617 P.2d at 124. (emphasis added)

The Alaska Supreme Court had before it, on the other hand, a complete factual record upon which a reasoned decision could be made (See Point I). In addition, the current lack of tribal courts among Alaska Native groups compelled the Alaska Court, as the available forum, to construe the statute; the *Bertelson* court issued dicta on the question of jurisdiction after remanding the case for further factual development. The two decisions cannot thus be said to conflict.

CONCLUSION

Certiorari should be denied and the Alaska decision let stand. There is no ripe issue for the court to decide since there is no clear conflict between the State's application of the ICWA to the facts as developed in the decision below. Thus there is no jurisdiction pursuant to 28 U.S.C. §1257(3).